Supreme Court, U.S.
FILED

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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER, TERM, 1993

RALPH FLEMING,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.Whether the failure of the Government to prove that the appraisals falsely represented the vehicles had been damaged by the Marcus Hook refinery, when the appraisals themselves did not contain such words, resulted in a failure to prove an element of offense charged, and violated the Fifth Amendment's Grand Jury and due proces clauses requiring that the conviction be reversed and Judgment of Acquittal entered?

II. Whether the Court of Appeals sanctioned a departure by a lower court from the accepted and usual course of proceedings as to call for an exercise of supervision by the Supreme Court

in sustaining a conviction based upon paragraph 13 of the indictment when the Government conceded at oral argument (A-722) that there was no evidence to support a conviction based upon paragraph 13 of the indictment?

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Neither the trial court opinion nor the Order of the Court of Appeals has been published.

JURISDICTION

(i) The Court of Appeals entered judgment on October 28, 1993, affirming the judgment of the district court.

(ii) Petition for rehearing was denied on December 1, 1993.

(iii) Pursuant to 28 U.S.C. Section 1254, cases in the court of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon petition of any party to any criminal case.

(iv) 18 U.S.C. Section 3231 provides that the district courts

"shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." The jurisdiction of the district court includes jurisdiction to try Ralph Fleming for the crime of mail fraud pursuant to 18 U.S.C. Section 1341.

CONSTITUTIONAL PROVISIONS and STATUTES INVOLVED

(i) The Fifth Amendment to the United States Constitution provides, *inter alia*: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ..."

(ii) 18 U.S.C. Section 1341 provides: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation or promises or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post

office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it was addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years

or both."

STATEMENT OF CASE

On Friday, January 15, 1993, the jury returned its verdict of guilty of Count # 20, 21 and 22 of the indictment with each count charging the crime of mail fraud as defined by 18 U.S.C. Section 1341. Motion for Judgment of Acquittal after Discharge of the Jury pursuant to Rule 29 (c) and/or Motion for New Trial pursuant to Rule 33 was timely filed. From Judgment of sentence entered April 15, 1993, Ralph Fleming timely filed his Notice of Appeal to the United States Court of Appeals for the Third Circuit.

The grand jury returned its

indictment against Ralph Fleming on October 28, 1992. 19 persons were charged in an indictment. All of the charges relate to the submission of fraudulent insurance claims, which falsely alleged damage to automobiles caused by the Sun Oil Company's Marcus Hook refinery.

Because of recurring problems at the Sun Oil refinery between 1988 and 1990, debris and various chemicals were released into the atmosphere. The emission of these particles by Sun Oil provided the impetus for the fraud that the Richard Melton and Ken Eline designed and perpetrated on Sun Oil and in which the Government contends

Ralph Fleming participated to the extent of three claims. During the period in question, the Government established that Sun Oil had a contract with the Travelers Insurance Company, pursuant to which Travelers administered all claims made in connection with damage caused by the Sun Oil emissions (A-327, 328).

Of the more than 1,000 claims submitted by Melton between 1988 and 1990 (A-334), more than 100 were for cars that were never damaged by Sun Oil and were never repainted. (A-335). The money for these claims (the typical claim ranging from $3,000 to $3,500, (A-332)) was split

between the Travelers appraisers who wrote the claims, the body shop owners that were allegedly repainting the vehicles and the people whose cars were used for the fraudulent claims (A-334). Richard Melton testified as to two separate schemes: one, where the claims of damaged vehicles were inflated (A-334) and two, where purely fraudulent claims were submitted of vehicles with no damage. (A-335).

Sun Oil claims were submitted through a number of different body shops. Ken's Auto Body, owned by Ken Eline was involved in more claims than any other shop (between 500 and 600 claims).

Eline testified that Ralph Fleming participated in three phony Sun Oil claims. Melton testified that in July 1988, he wrote an appraisal estimating the costs of certain work for Fleming's 1988 Chevrolet Silvarado (Exhibit-1 identified at A-341) including painting at $3,710.00 (A-343). Melton and Eline testified that the check was mailed to Ken's Auto Body and that the money from the claim was split three ways between themselves and Fleming and that the vehicle was not painted.

Melton testified that on August 23, 1989, he wrote two appraisals (Exhibit 2 and 3 identified at A-344) on Fleming's

vehicles. Melton wrote an appraisal estimating the costs of certain work for Fleming's Silvarado and that the cost of painting would be $3,985.60 (A-344). Melton also stated he wrote an appraisal estimating the costs of certain work for another vehicle owned by Fleming, a 1989 Chevrolet Blazer. This appraisal estimated the cost of painting the Blazer at $4,483.27 (A-345). Melton and Eline did testify that the vehicles were not painted and that the checks were mailed to Ken's Auto Body and that the money was split three ways between Melton, Eline and Fleming (Melton, A-348; Eline, A-75). Eline testified that none of the

Fleming's vehicles were ever damaged by Sun Oil (A-76).

Although paragraph 12 (A-5) of the indictment stated that the appraisals stated the three vehicles had been damaged by the emissions from the Sun Oil refinery and the verdict stated "claim applications were submitted which falsely stated that the defendant's vehicles were damaged by emissions from Sun Oil Company's Marcus Hook refinery . . . " , no such representation appears on Government Exhibits 1, 2 or 3.(A-700,701,702). Government Exhibit No. 4(A-704), which pertains to Michael Luczyszyn contains the statement on page two "damage by

chemical blow-off." (A-705)

The verdict stated

> Counts twenty, twenty-one, and twenty-two incorporate by reference one through seventeen of Count One through ten. Counts twenty, twenty-one and twenty-two of the Indictment further charge that as part of the scheme, **claim applications were submitted which falsely stated that the defendant's vehicles were damaged by emissions from Sun Oil Company's Marcus Hook Refinery and that the vehicles required repairs.** (A-714)

Although the Government conceded at oral argument (A-722) that there was no evidence to support a conviction based upon paragraph 13 of the indictment, the District Judge in his opinion upheld the conviction based in part upon paragraph 13. Paragraph 13 states:

> Travelers appraisers would and did write fraudulently inflated appraisals, which

> falsely represented both the extent of the damage to automobiles, and the cost of repairing that damage. (A-6)

REASONS FOR GRANYING THE WRIT

The Fifth Amendment guarantees that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . " Felony charges must be framed by a grand jury and a defendant may be tried only on the charges the grand jury approved, as it approved them and no others. The district judge can not "change the charging part of an indictment to suit [his or her] own notion of what it ought to have been, or what the grand jury

would probably have made it if their attention had been called to suggested changes." Ex parte Bain, 121 U.S. 1, 10, 7 S.Ct. 781, 786, 30 L.Ed. 849 (1887). The settled rule, therefore, is that an indictment may not be amended except by resubmission to the grand jury. Russell v. United States, 369 U.S. 749 (1962); United States v. Leichtnam, 948 F.2d 370 (7th Cir. 1991).

As explained in United States v. Castro, 776 F.2d 1118, 1121 (3d Cir. 1985), cert. denied, 475 U.S. 1029 (1986), two types of variations between the indictment and evidence exist: amendments, which occur when the

charging terms of the indictment are altered, and variances, where the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. If the variation is an amendment, it constitutes a per se violation of the fifth amendment grand jury clause. Id. at 1121-22. Variances, however, are subject to less strict case-by-case inquiry, and only constitute reversible error in those cases where the variance prejudiced the defendant's defense. Id. at 1122. An indictment is impermissible amended if it is broadened, so as to present the trial jury with more or different

offenses than the grand jury charged. United States v. Leichtnam, supra. Any broadening of the possible bases for conviction from that which appeared in the indictment is fatal. Id. (citing United States v. Miller, 471 U.S. 130, 138 (1985)). It is reversible per se. United States v. Leichtnam, supra (citing Stirone v. United States, 361 U.S. 212, 217 (1960)).

As explained in United States v. Leichtnam, supra:

> Consequently, if an indictment charges a RICO conspiracy among individuals "associated with an enterprise, to wit . . . the DeCavalcante Family of La Cosa Nostra," the jury must be instructed that to convict the defendants it has to find, not merely that they were associated with just any

enterprise, as "enterprise" is defined in 18 U.S.C. § 1961(4), but specifically that the enterprise the defendants were associated with was the DeCavalcante family. For the more general instruction would allow the defendants to be convicted of an enterprise other than the one charged in the indictment, violating their right to be tried only on the charges approved by the grand jury--even though proof of an "enterprise," as defined by the RICO statute, in no way hinges on the particular identity of the members of the enterprise and even though a conviction might have been possible under an indictment that had simply tracked the general language of the statute to describe the enterprise, rather than specifying "an enterprise, to wit . . . the DeCavalcante Family." **When included in the indictment, the words "to wit . . . the DeCavalcante Family" become an essential element of the charge.**

948 F.2d at 377-78 (emphasis added).

The court continued:

In the same fashion, if an indictment charges a defendant with inducing two particular

women, named in the indictment, to engage in prostitution, the identities of those two women are not surplusage. Though the evidence at trial deals with the defendant's relationships not only with those two women but also with others, the jury must be instructed that to convict it has to be satisfied with the evidence regarding the two named women. The defendant may not be convicted of inducing prostitution generally if the indictment charges, specifically, that he induced two women in particular. . . . And, if an indictment charges use of a "false, fictitious and misrepresented identification, that is a Mississippi driver's license . . . in that Ernest Adams represented that he was Ernest Cole," then the charge is for using a false name. Though the defendant may have used both a false name and a false address, the indictment does not say that, and though the evidence introduced at trial may be sufficient to support a conviction for using a false name, if evidence is also introduced about the false address and the jury instructions make reference both to "identity and address," then a possible basis for conviction not set out in the indictment, falsification of address, has

> been added to the only basis that was set out in the indictment, falsification of name. The result is an impermissible constructive amendment to the indictment and reversal is automatic.

Id. at 378 (citation omitted).

Thus, when an indictment charges mail fraud by means of a specific misrepresentation, the defendant cannot be convicted on the basis of a different misrepresentation or a general scheme to defraud. In United States v. Frankel, 721 F.2d 917 (3d Cir. 1983), the court affirmed the dismissal of a mail fraud indictment because the indictment relied on a misrepresentation theory unsupported by the allegations. The court observed that schemes

to defraud come within the scope of the mail fraud statute even absent a false representation. The court stated, however, that in the case before it "the indictment charges defendant with misrepresentations and therefore we must assume that the grand jury based its allegations on that offense. Since the government chose to rely on misrepresentations, it must prove them." Id. at 921 (citing United States v. Kram, 247 F.2d 830, 832-33 (3d Cir. 1957)).

In United States v. Kram, supra, relied on by the court in Frankel, the court stated that a mail fraud indictment may or may not allege that the solicitation

was so drawn as to be intentionally misleading. 248 F.2d at 832. In the case before it, however, the government chose to allege in the indictment that the solicitation was intentionally misleading; thus, the court held that the government was bound to prove this allegation in order to convict the defendant. As the court stated:

> But in this case the United States has elected to set up in the indictment as the substance of the offense that the printed material, with which the religious object was enclosed, was drawn up in such a manner as to mislead the persons who received it from Kram into thinking it was a solicitation from a religious organization. If the United States has failed to prove this allegation it has failed to prove, in the words of the indictment, "the substance of * * * [the] scheme", and, hence to prove Kram guilty as charged in the indictment. This is true

whether or not Kram in fact devised and executed a fraudulent scheme to mulct the public by the use of the mails. **In other words the United States has cast its whole case on the proof of an intentionally misleading solicitation. It need not have done so but it so chose and must stand or fall on its choice. To try Kram upon some other theory of guilt in view of the charge of the indictment would be to deny him due process of law.**

Id. at 832-33 (emphasis added).

The foregoing portions of Frankel and Kram were reaffirmed by the third circuit in United States v. Olatunji, 872 F.2d 1161, 1165 (3d Cir. 1989), where the court stated:

[W]e note that the indictment charges Olatunji with misrepresentations and therefore, we must assume that the grand jury based its allegations on this premise. See United States v. Frankel, 721 F.2d 917, 921 (3d Cir. 1983). As we stated in Frankel, "[s]ince the government chose to rely on misrepresentations, it must prove

them." Id. See also United States v. Kram, 247 F.2d 830, 832-33 (3d Cir.1957).

The decision of the United States Court of Appeals is contrary to its own prior decisions in United States v. Kram, 247 F.2d 830 (3d Cir. 1957); United States v. Frankel, 721 F.2d 917 (3d Cir. 1983); United States v. Olatunji, 872 F.2d 1161, 1165 (3d Cir. 1989) and contrary to the Supreme Court decision in Stirone v. United States, 361 U.S. 212, 217 (1960); Williams v. United States, 458 U.S. 279, 285 (1982) and United States v. Miller, 471 U.S. 130, 138 (1985).

The Government failed to prove an essential element of the

offense as defined by the indictment. This failure violates the Fifth Amendment's Grand Jury clause requiring that the conviction be reversed and Judgment of Acquittal entered. This result is required by the decisions cited herein of the Court of Appeals and of the United States Supreme Court. The decision of the Court of Appeals creates a conflict with decisions of other circuits: United States v. Leichtnam, 948 F.2d 370 (7th Cir. 1991); United States v. Keller, 916 F.2d 628 (11th Cir. 1990); United States v. Roshko, 969 F.2d 1 (2nd Cir. 1992); United States v. Harrill, 877 F.2d 341 (5th Cir. 1989).

In this case, the Defendant was charged in paragraph 12 of the indictment as follows:

> Manner and Means of Executing the Scheme:
>
> It was part of the scheme and artifice that: 12. Travelers appraisers would and did write fraudulent appraisals, **which falsely represented that automobiles at Ken's Auto Body had been damaged by the Marcus Hood Refinery**, when these automobiles had no such damage. (A-5) (emphasis added)

Although the Government conceded at oral argument (A-722) that there was no evidence to support a conviction based upon paragraph 13 of the indictment, the District Judge in his opinion upheld the conviction based in part upon paragraph 13. Paragraph 13 states:

> Travelers appraisers would

and did write fraudulently inflated appraisals, which falsely represented both the extent of the damage to automobiles, and the cost of repairing that damage. (A-6)

In addition, the verdict slip given to and returned by the jury stated as follows:

Counts twenty, twenty-one, and twenty-two incorporate by reference one through seventeen of Count one through ten. Counts twenty, twenty-one and twenty-two of the Indictment further charge that as part of the scheme, **claim applications were submitted which falsely stated that the defendant's vehicles were damaged by emissions from the Sun Oil Company's Marcus Hook Refinery** and that the vehicles required repairs.
(A-714) (Emphasis added)

The court charged the jury, *inter alia*, :

In order to sustain its burden of proof for the crime of using the mail to further a scheme or plan to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises as

charged in the indictment, the Government must prove the following three essential elements beyond a reasonable doubt: 1) The Defendant devised or knowingly participated in a scheme or artifice to obtain money or property by means of false or fraudulent pretenses, representations or promises **as detailed in the indictment**; 2) The Defendant knowingly and willfully participated in this scheme or knowingly and willfully abetted others in the scheme with knowledge of its fraudulent nature with a specific intent to defraud; And, 3) In advancing or furthering the scheme to obtain money or property by means of false or fraudulent pretenses, representations or promises, the defendants or defendants' co-conspirators used the mails or caused the mails to be used. (A-679,680) (emphasis added)

The relevant language of the indictment was read to the jury as part of the charge. (A-675) In light of the indictment, verdict slip and the charge, the Defendant at the conclusion of the charge requested the

following supplemental instruction:

> To determine whether a misrepresentation was made to the insurance company, you must find on claims - - claims submitted to the insurance company that a misrepresentation had been made.

This request was denied by the trial court. (A-689)

In this case, then, the words "fraudulent appraisals, which falsely represented that automobiles at Ken's Auto Body had been damaged by the Marcus Hook Refinery," included in the indictment, became an essential element of the charge which the government was required to prove in order to convict Fleming. United States v. Leichtnam, 948 F.2d 370 (7th Cir. 1991); United States v. Frankel, 721 F.2d 917

(3d Cir. 1983). The foregoing portion of the indictment can fairly be read as charging that the appraisals contained false representations that the automobiles had been damaged by the Marcus Hook Refinery. Such allegation was thus an essential element of the charge against the defendant. But, as even the district court recognized, the appraisals contained no such misrepresentations. The statement of the District Judge that "Paragraph 12 of the indictment alleges that the appraisals 'falsely represented' the vehicles had been damaged by the Marcus Hook refinery, not that the forms themselves explicitly

stated those words" (page 4 of the opinion) ignores the plain meaning of words used in their proper context. The District Judge allowed the jury to convict Fleming of a general scheme to defraud.

This ignores the precise fact situation set forth in United States v. Kram, 247 F.2d 830 (3d Cir. 1957). The issue presented by Ralph Fleming is significant in that the District Court and the Court of Appeals departed from the holdings of United States v. Kram, 247 F.2d 830 (3d Cir. 1957); United States v. Frankel, 721 F.2d 917 (3d Cir. 1983); United States v. Olatunji, 872 F.2d 1161, 1165 (3d Cir.

1989) by relying on the context in which the forms were submitted to show that the forms were specifically meant to be representations rather than the words themselves. Furthermore, it is contrary to the holding of United States v. Frankel that where the Government relies upon a fraudulent misrepresentation, the defendant must explicitly make the representation. The representation can not be implied. 721 F.2d at 919; Williams v. United States, 458 U.S. 279, 285 (1982). No other misrepresentations were shown at trial nor were they alleged in the indictment and defendant could not be convicted by

such proof. The government was required to prove the misrepresentations specifically alleged in the indictment. The trial court, by failing to charge the jury as requested concerning the alleged misrepresentations and denying defendant's motion for judgment of acquittal, in effect, constructively amended the indictment by broadening it to allow a conviction on the basis of allegations not charged in the indictment. In this case, the trial court broadened the indictment by allowing the conviction to stand even though no written misrepresentations were shown to have been made. Any "broadening [of] the possible

bases for conviction from that which appeared in the indictment," United States v. Miller, 471 U.S. 130, 138, 105 S.Ct. at 1816 is fatal. It is reversible per se. Stirone, *supra*, 361 U.S. at 217, 80 S.Ct. at 273.

The decision of the Court of Appeals creates a conflict with decisions of other circuits: United States v. Leichtnam, 948 F.2d 370 (7th Cir. 1991); United States v. Keller, 916 F.2d 628 (11th Cir. 1990); United States v. Roshko, 969 F.2d 1 (2nd Cir. 1992); United States v. Harrill, 877 F.2d 341 (5th Cir. 1989). Leichtnam was indicted for having "knowingly use[d] and carr[ied] a

firearm: to wit a Mossberg rife, Model 250CA with no serial number." The court's instruction that the jury could convict if convinced that Leichtnam had used "a firearm." The Seventh Circuit held that the grand jury's framing of the indictment made the Mossberg an essential part of the charge and limited the basis for possible conviction to the Mossberg. United States v. Leichtnam, 948 F.2d at 379. "That was clear error and Leichtnam's conviction on count three must be reversed." 948 F.2d at 381. The Eleventh Circuit held that the Keller's indictment was constructively amended by the court's instruction that allowed

and encouraged the jury to find him guilty of conspiracy so long as Keller had conspired with anyone, even someone not named in the indictment. Thus in Keller the indictment was broadened by the change. United States v. Keller, 916 F.2d at 636. In Roshko, the government argued when the grand jury wrote "alien" it really meant "aliens." The court concluded that there had been a constructive amendment when the district court admitted a certain INS application without limiting instruction. United States v. Roshko, 969 F.2d at 5. Finally in United States v. Harrill, the Fifth Circuit held that the

indictment charged Harrill with submitting false statements to influence the actions of BancTexas-Dallas to approve requests for "loans and advances." The instruction made convictions alternately possible for "changes or extension." Conviction reversed and remanded. United States v. Harrill, 877 F.2d at 344.

In each of these case, the court of appeals found that the indictment had been impermissible broadened: in Leichtnam from Mossberg rife to any rife; in Keller from conspiracy with Smith to a conspiracy with any one; in Roshko from alien to aliens; and in Harrill from "loans and

advances" to "changes or extension."

Fleming contends that the District Court broadened the indictment to permit the conviction even though the application did not contain the words alleged in the indictment to be present.

Therefore, defendant's conviction must be reversed and judgment of acquittal entered. See United States v. Kram, supra and United States v. Artrip, 942 F.2d 1568 (11th Cir. 1991) (where indictment charged defendant with bank fraud by use of a false financial statement to obtain a loan based on defendant's over-valuation of his assets, the

district court erred in failing to instruct the jury as requested that the jury was not to consider evidence of defendant's liabilities since the indictment did not charge that he misrepresented his liabilities to obtain the loan; the failure to give the instructions broadened the indictment and constructively amended it to allow defendant to be convicted of a charge not included in the indictment; therefore, the conviction was reversed).

Moreover, even if the variation between the indictment and the evidence is considered a variance rather than an amendment, defendant's conviction

must still be reversed. The evidence at trial proved facts materially different from those alleged in the indictment. This variance prejudiced defendant's defense. He relied on the allegation in the indictment and the verdict slip that the appraisals falsely stated that the vehicles were damaged by Marcus Hook Refinery. Defendant's trial tactics were premised on the government's obligation to prove that the appraisals contained the false representation alleged. The Defendant presented no evidence except that of reputation witnesses. Thus, by allowing the conviction to be based upon the

appraisal form that according to the District Judge implicitly made a representation is an impermissible material variance that is prejudicial to the Defendant. Defendant had no notice of such a possibility until he read the court opinion's dismissing Post Trial motions. See Government of Virgin Islands v. Joseph, 765 F.2d 394 (3d Cir. 1985) (variance between information and verdict violated defendant's fifth amendment rights and required reversal; the variance denied defendant an opportunity to prepare an adequate defense and prejudiced his substantial rights). Accordingly, this material

variance requires reversal of defendant's conviction and in accordance with the decision in United States v. Kram, 247 F.2d 830, 832-33 (3d Cir. 1957), and Joseph, supra, requires that judgment of acquittal be entered.

Wherefore Petitioner prays Your Honorable Court to enter an Order granting the Petition for Writ of Certiorari and after argument entry of an order reversing the defendant's conviction and directing that judgment of acquittal be entered.

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APPENDIX

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATED

CRIMINAL ACTION
NO. 92-608-6

v.

RALPH FLEMING

M E M O R A N D U M

EDUARDO C. ROBRENO, J.
APRIL 13, 1993

Defendant Ralph Fleming was convicted by a jury on three counts of mail fraud in violation of 18 U.S.C. # 1341. The conviction arose from the defendant's involvement in a scheme to submit fraudulent claims to an insurance company for damage to his motor vehicles. Defendant has filed motions for

judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c) or for a new trial pursuant to Federal Rule of Criminal Procedure 33, seeking relief from his conviction. For the reasons set forth below, I will deny the motions.

I. BACKGROUND

Between 1988 and 1990, emissions containing debris and various chemicals were released into the air by the Marcus Hook oil refinery of the Sun Oil Company ("Sun Oil"), causing damage to the finish of automobiles in, near, and around the area of the refinery. Sun Oil was self-insured. To

administer the approximately 1,500 claims for damage resulting from these emissions, Sun Oil contracted with the Travelers Insurance Company ("Travelers"). Certain Travelers appraisers who were assigned to adjust the claims, along with certain automobile body-shop owners, designed a scheme intended to mislead Travelers into paying for the costs of repairs to vehicles that were not damaged by the refinery emissions or for inflated costs of repairs to vehicles actually damaged. The money that Travelers paid on the fraudulent claims on behalf of Sun Oil was apportioned among the

participants in each claim, typically: 1) one-third to the Travelers appraisers who wrote the claims; 2) one-third to the body-shop owners who allegedly repaired the vehicles claimed to have been damaged; and 3) one-third to the owners of the vehicles that were used as the basis of the fraudulent claims. Fleming participated in the submission of three fraudulent "appraisal" claims forms for damage to vehicles that he owned, and he received one-third of the amount that Travelers paid for each of the three claims. [1]

II. DISCUSSION

Defendant contends that the

Government failed to prove a necessary element of its case, and that the Court erred by admitting into evidence copies instead of the originals of certain documents. The defendant also claims error in the jury charge concerning the weight to be accorded character evidence and the pre-indictment destruction of documents by Government witnesses.

In deciding a motion for judgment of acquittal, the Court must view the evidence in the light most favorable to the Government, draw all reasonable inferences in the Government's favor, and uphold

the verdict unless no rational juror could have found guilt beyond a reasonable doubt. United States v. Skulsky, 786 F.2d 558, 563 (3d Cir. 1986). With respect to the motion for a new trial, the Court may grant a new trial only in exceptional circumstances involving a miscarriage of justice or where evidence predominates heavily against the verdict. United States v. Bevans, 728 F. Supp. 340, 343 (E.D. Pa.), aff'd, 914 F.2d 244 (3d Cir. 1990); see also United States v. Rush, 749 F.2d 1369, 1371 (9th Cir. 1984). I will address each of the defendant's contentions seriatim.

A. Failure to Establish a Necessary Element of the Case.

Fleming first argues that the Government was required, but failed, to prove that the appraisal claims forms contained the misrepresentation that emissions from the Marcus Hook refinery damaged his vehicles, as alleged in the indictment. Paragraph 12 of the indictment states, "Travelers appraisers could and did write fraudulent appraisals, which falsely represented that automobiles at Ken's Auto Body had been damaged by the Marcus Hook Refinery, when these automobiles had no such

damage." Fleming contends that because the Government chose to rely on this allegation as the basis for his offenses, the Government must show that the three appraisal claims forms submitted to Travelers state literally that the defendant's automobiles were "damaged by the Marcus Hook Refinery." If the defendant is correct that the appraisal forms must contain these exact words in order to sustain the jury's guilty verdict, then defendant's motions would have merit, as the forms undisputedly do not contain such words. Fleming's challenge fails for at least two reasons.

1. The Government has offered sufficient evidence to prove the allegations of paragraph 12 of the indictment.

Assuming arguendo that the Government needed to prove the allegations of paragraph 12 of the indictment in order to sustain the conviction, the Court concludes that the Government offered sufficient evidence at trial to prove these allegations. Paragraph 12 of the indictment alleges that the appraisals "falsely represented" the vehicles had been damaged by the Marcus Hook refinery, not that the forms themselves explicitly stated those words. Fleming relies upon the Third Circuit's

decision in United States v. Frankel, 721 F.2d 917 (3d Cir. 1983), for the proposition that when the Government has chosen to rely upon a misrepresentation as one of the elements of an indictment under the mail fraud statute, the Government must show that the defendant "explicitly" made that misrepresentation. See Memorandum of Law in Support of Post Trial Motions at 7-8. United States v. Frankel involved the dismissal of an indictment which charged mail fraud in connection with a check kiting scheme. See 721 F.2d at 917. In Frankel, the Government had alleged that the presentation of checks to banking

institutions constituted "implicit" misrepresentations of "the existence of adequate funds in the accounts to cover each check written." Id at 919.

Contrary to Fleming's interpretation of Frankel, the Third Circuit did not affirm the district court's dismissal of the indictment on grounds that implied misrepresentations cannot form the basis of a violation of the mail fraud statute. Instead, the Frankel indictment was dismissed because the presentation of a check in and of itself is not a factual representation capable of characterization as true or

false. See Frankel, 721 F.2d at 919 (relying on Williams v. United States, 458 U.S. 279, 284, 102 S. Ct. 3088, 3092 (1982)). Therefore, the Government could not prove any misrepresentations under the indictment, whether explicit or implicit. See id. In contrast, the representations contained in the appraisal forms submitted by Fleming, i.e., that the automobiles at Ken's Auto Body were damaged by the Marcus Hook refinery, are capable of characterization as true or false. To put it another way, while the representations contained in the Frankel checks were neither true nor

false (in the absence of the "implicit" representation of the existence of adequate funds to cover the checks), the very representations contained in the appraisal forms in the present case were false on their faces. While it is true, as the defendant points out, that the Government must prove the misrepresentations that it chooses to charge in the indictment, see Frankel, 721 F.2d at 921, Frankel does not require that the Government prove that the false representations described in paragraph 12 of the indictment appear verbatim on the faces of the appraisal forms. [2].

Absent such a literal requirement, the Court finds ample evidence on the record through which the Government proved at trial that the appraisal forms misrepresented that the defendant's automobiles at Ken's Auto Body were damaged by the Marcus Hook refinery. The appraisal forms themselves facially identified the owner of the vehicles (Fleming), the insured for the claims (Sun Oil), and the type of repairs supposedly required. See Gov. Exs. 1-3. The forms further identified the body-shop for the repairs (Ken's Auto Body), the

address of the vehicle owner (Marcus Hook [3]), and the insurance carrier to whom the claims were submitted (The Travelers Insurance Companies [4]). See id.

Moreover, testimony concerning the context in which the forms were submitted to Travelers showed that the forms were specifically meant to be representations that these automobiles had been damaged by Sun Oil's Marcus Hook refinery. For example, Richard Melton, the Travelers appraiser who wrote the appraisal forms admitted as Government Exhibits One through Three, testified that when Sun

Oil's Marcus Hook refinery had major chemical spills in the summer of 1988 and on August 20, 1989, he wrote the phony claims for Ralph Fleming's vehicles as part of his assignment to write the claims for these spills. See Trial Tr. of Jan. 13, 1993, Doc. No. 119, at 9-10, 15-16, 21-28 (testimony of Richard Melton); see also Trial Tr. of Jan. 12, 1993, Doc. No. 96, at 17-18, 33-41, 134-35 (testimony of Kenneth Eline) (explaining that Melton, Eline, and Fleming submitted the fraudulent claims for Fleming's cars within the specific context of the Marcus Hook refinery spills); cf. Trial

Tr. of Jan. 13, 1993, Doc. No. 97, at 48 (testimony of Edward Sieradzki) (explaining that the claims being made in the Marcus Hook area were the result of the Sun Oil refinery emissions). [5] Finally, two of the three checks that Travelers paid in response to the submission of the appraisals for Fleming's vehicles expressly referred to "Sun Oil -- 8/20," which was the date of one of the) major Sun Oil Marcus Hook refinery spills that caused damage to area vehicles and generated many claims. See Gov. Exs. 6-7. Considering all the evidence the Government offered at trial, therefore, the evidence

sufficiently supports the allegation of paragraph 12 of the indictment that the appraisal forms "falsely represented" that Fleming's automobiles were damaged by the Marcus Hook refinery.

2. The Government has additionally offered sufficient evidence to prove the allegations of paragraph 13 of the indictment.

Fleming's challenge to the sufficiency of the Government's proof must fail for a second reason as well. In addition to the misrepresentations of paragraph 12 of the indictment that emissions from Sun Oil's Marcus Hook refinery had damaged the cars, the Government

further alleged in paragraph 13 of the indictment, and proved at trial, that Travelers appraisers fraudulently "inflated" the costs of repairs. See Indictment par. 13; Gov. Exs. 1-3. [6]. Proof of these misrepresentations, provided the Government has also proven all other elements of the offense, supports the conviction independently of proof of the misrepresentations that the emissions from the Marcus Hook refinery caused damage to the defendant's cars. See United States v. Miller, 471 U.S. 130, 131-33, 136-38, 105 S. Ct. 1811, 1813, 1815-16 (1985); United States v. Geogalis, 631 F.2d

1199, 1205 (5th Cir. 1980) [7].

B. Admission of Copies of Documents.

Defendant maintains that the Court erred in admitting into evidence copies of documents relating to claims for defendant's vehicles. Specifically, the defendant contends that the Court erred in admitting into evidence Government Exhibits One through Three and Five through Seven,[8] rather than requiring that the Government produce the originals of these documents. The Court rejects this argument.

Federal Rule of Evidence 1003 controls this issue. Rule

1003 provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Fed. R. Evid. 1003; see also , FDIC v. Rodenberg, 571 F. Supp. 455, 457-58 (D. Md. 1983) (decision as to whether copies are admissible as duplicates under Rule 1003 is within trial court's discretion, and decision is one of trustworthiness and fairness). The defendant has neither raised a genuine issue as to the authenticity of the originals of

Exhibits One through Three and Five through Seven, nor demonstrated why under the circumstances it would be unfair to admit the duplicates. Accordingly, there was no error in admitting into evidence these exhibits.

Under Federal Rule of Evidence 901, authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). The first example of sufficient authentication that the Rule provides is testimony of a witness with knowledge that a matter is what it is

claimed to be. Fed. R. Evid. 901(b)(1). Testimony, therefore, from Richard Melton, who wrote the appraisals, and Kenneth Eline, who cashed and endorsed the checks and who owned the body-shop that was the payee, sufficed to authenticate these exhibits. See Trial Tr. of Jan. 13, 1993, Doc. No. 119, at. 21, 24-25 (testimony of Richard Melton); Trial Tr. of Jan. 12, 1993, Doc. No. 96, at 34-45, 111-16 (testimony of Kenneth Eline).[9]

Defendant, nonetheless, objects to the authentication of the exhibits on the basis that no custodian of these records from

Travelers testified as to their authenticity. However, nothing in Rule 901 requires this, Fed. R. Evid. 901, and the Court may find the authentication requirement "satisfied by evidence other than testimony concerning the chain of custody." Georgalis, 631 F.2d at 1205-06.

The defendant further challenges the admission of Government Exhibit One, which consists of a copy of page one of a two-page original appraisal form, on the basis that the second page was not produced. Defendant offers no reason to suspect that the copy of page one

is not identical to page one of the original. The defendant relies upon United States v. Alexander, 326 F.2d 736 (4th Cir. 1964), a case in which the Government offered into evidence a copy of a check, but the copy had not duplicated key terms from the original, including the name and address of the payee, and also possibly the date, amount, and other figures. Id. at 738 & n.4. A Government witness instead had typed into these gaps and omissions what the Government claimed to be an accurate statement of the original terms, which themselves were "vitally material

to the Government's case." Id. at 738-40. In this case, in contrast to Alexander, there is no issue of gaps or omissions on the copy admitted, nor are the material terms for which the exhibit was offered missing from the admitted page. In fact, the defendant has not suggested that the Government inserted or otherwise altered the key terms appearing on the admitted exhibit. Moreover, the defendant has neither suggested why the second page is necessary for an understanding of the information contained on the first page, [10] nor otherwise shown why, under the circumstances, it was unfair

to admit the first page without a copy of the second. Therefore, the copy of what was originally page one of a two-page document was properly admitted as a duplicate of the first page. Fed. R. Evid. 1003"

C. Jury Instructions.

Defendant's remaining arguments relate to this Court's charge to the jury. First, defendant argues that this Court's instruction on character evidence was improper. Defendant contends that he was entitled to an instruction that evidence of good character may by itself raise reasonable doubt as to the defendant's guilt. I disagree.

In judging the adequacy of the charge, the Court must view the instructions in their entirety, and consider their general effect. See United States v. Bey, 736 F.2d 891, 896 (3d Cir.1984); Avoub v. Spencer, 550 F.2d 164, 168 (3d Cir.), cert. denied, 432 U.S. 907 (1977). I am not obligated to use defendant's requested charge, in toto, as long as my language is sufficient to present fairly and adequately the issue to the jury. See Link v. Mercedes-Benz of N. Am. Inc., 788 F.2d 918, 922 (3d Cir. 1986).

During the charge conference, Fed. R. Crim. P. 30,

the defendant asked the Court to supplement its proposed charge on character evidence with an instruction to the jury that character evidence alone may raise a reasonable doubt.[11] The Court declined the instruction, instead charging the jury with an instruction taken nearly verbatim, in relevant part, from the charge that the Third Circuit approved in United States v. Spangler, 838 F.2d 85, 86-87 (3d Cir.), cert. , 486 U.S. 1033, and cert. denied, 487 U.S. 1224 (1988).

The character evidence charge ultimately given to the jury was as follows:

Each defendant has offered evidence of his good general reputation for truth, veracity, honesty and integrity and being a law-abiding citizen. You should consider such character evidence along with all the other evidence you've heard in the case when making your determination as to whether the Government has proved beyond a reasonable doubt that the defendant whose case you are considering committed the particular crime or crimes that are alleged in the indictment.

Trial Tr. of Jan. 14, 1993, Doc. No. 98, at 67 (jury charge).

Under Spangler, the Court need not instruct the jury that character evidence alone may create a reasonable doubt that the Government has proven all elements of the offense charged.

Rather, the Court need only give the jury an instruction

that calls attention to its duty to take character evidence into consideration along with all other admitted evidence. See Spangler, 838 F.2d at 87. The Court therefore did not abuse its discretion in instructing the jury as to the weight to be accorded character evidence.

Defendant's second criticism or the jury instructions is that the Court failed to charge the jury that an adverse inference could be drawn against the Government because two of its witnesses, Richard Melton and Kenneth Eline, had destroyed evidence before they began cooperating with the Government.

Defendant claims that Federal Rule of Evidence 1004(1) mandates such a charge under the circumstances of the case, and he also cites to Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333 (1988), in support of his argument.

The short answer is that neither Youngblood nor Federal Rule of Evidence 1004(1) requires the charge that the defendant sought. In Youngblood, the United States Supreme Court reversed the Arizona Court of Appeals and reinstated the trial court's conviction, holding that the defendant was required to show that the police acted in bad

faith with respect to the destruction of evidence before the conviction would be reversed. 488 U.S. at 55, 57-58, 109 S. Ct. at 336-38. Federal Rule of Evidence 1004(1) requires the admission of collateral evidence of the contents of a writing if the original writing is lost or destroyed, unless the proponent of the evidence lost or destroyed the original in bad faith. Fed. R. Evid. 1004(1). Both Youngblood and Rule 1004(1) focus upon the bad faith loss or destruction of evidence by the proponent of the evidence, who in the present case is the Government.[12] The defendant,

however, pointed to no evidence that the Government knew of, or participated in, either Melton's or Eline's destruction of records. In fact, at trial both Melton and Eline testified that they destroyed the records before they began cooperating with the Government. See Trial Tr. of Jan. 13, 1993, Doc. No. 119, at 45, 35=36 (testimony of Richard Melton); Trial Tr. of Jan. 12, 1993, Doc. No. 96, at 145-46 (testimony of Kenneth Eline). Therefore, there was neither loss or destruction of evidence by the Government, nor evidence of any bad faith on the part of the Government, which would

entitle the defendant to an adverse inference instruction. See Eaton Corp. v. Appliance Valves Corp., 790 F.2d 874, 878 (Fed. Cir. 1986). Accordingly, there was no error in the charge to the court.

An appropriate Order will be entered.

Footnotes:

1. The amounts that Travelers paid for the three claims for Ralph Fleming's vehicles were $3,710.00, $3,985.60, and $4,483.27.

2. Government Exhibits 1-3 are duplicates of the appraisal forms for the claims involving defendant Ralph Fleming, whereas Government Exhibit 4 is an appraisal form offered into evidence against Ralph Fleming's co-defendant Michael Luczyszyn. The two defendants were tried together. Count 19 of the indictment charged Michael

Luczyszyn with mail fraud; counts 20-22 of the same indictment charged Ralph Fleming with mail fraud.

Unlike Government Exhibits 1-3, Government Exhibit 4 contains the notation "damage by chemical blow-off." Gov. Ex. 4. Fleming argues that such words made Exhibit 4 an explicit misrepresentation conforming with the misrepresentation alleged in the indictment against Luczyszyn, in contrast to Exhibits 1-3 that were offered against Fleming himself. This argument is inconsistent, however, with Fleming's position that the appraisal forms must contain the explicit misrepresentations as written in the indictment. If the defendant would have the Court determine as a matter of law that the exact words contained in the indictment must appear on the face of the appraisal forms, then Exhibit 4 would also have been deficient evidence, contrary to the defendant's argument. Exhibit 4, like Exhibits 1-3, does not expressly state "damaged by the Marcus Hook Refinery," nor does the Indictment expressly allege the misrepresentation "damage by chemical blow-off." Defendant does not explain why

Exhibit 4 may be construed as sufficiently explicit, but Exhibits 1-3 may not. Moreover, it is unclear what rule of law defendant would have the Court apply in determining that Exhibit 4 adequately conforms with the misrepresentations alleged in the indictment, but that Exhibits 1-3 do not.

3. Richard Melton testified that if a claim was made for a vehicle that was located or registered in the Marcus Hook area, the appraisal form did not need to indicate on its face why the car was in Marcus Hook during one of the refinery's periods of emissions. see Trial Tr. of Jan. 13, 1989, Doc. No. 119, at 62 (testimony of Richard Melton). What is to say, when he submitted to Travelers an appraisal form for the insured Sun Oil that stated that the vehicle at issue was located or registered in Marcus Hook, the form thereby represented to Travelers that the basis for the claim was damage from the Marcus Hook refinery emissions.

4. Defendant has also challenged the sufficiency of the Government's proof by arguing that the Government failed to

prove a connection between Travelers Insurance Company, which administered the Sun Oil claims, and the Travelers subsidiary Constitution State Service Company, which in name issued the checks on the claims. This challenge is without merit for at least two separate reasons. First, the Government need not have proven every factual allegation contained in the indictment in order to sustain the conviction. See United States v. Miller, 471 U.S. 130, 131-33, 136-38, 105 S.Ct. 1811, 1813, 1815-16 (1985). The allegations in the present indictment concern a scheme to defraud Travelers Insurance Company, and the appraisal forms explicitly state that they are appraisal forms for "The Travelers Insurance Companies." See Gov. Exs. 1-3. In addition, Kenneth Eline testified that the checks he received for the defendant's claims were from the Travelers Insurance Company." See Trial Tr. of Jan. 12, 1993, Doc. No. 96, at 36 (testimony of Kenneth Eline); see also Trial Tr. of Jan. 13, 1993, Doc. No. 119, at 4-5, 35-36 (testimony of Richard Melton). Thus the Government has offered sufficient evidence of the scheme and

conduct to defraud Travelers, as alleged in the indictment, even in the supposed absence of evidence of a connection between Travelers and its subsidiary.

Second, assuming that the Government had to prove a "connection" between the two companies in order to prevail, sufficient circumstantial evidence was offered to satisfy this requirement. For example, the checks that Constitution State Service Company issued explicitly stated that the company issued them as servicing agent for Sun Company. See Gov. Exs. 5-7. The checks were made payable to Ken's Auto Body, and they stated the name Fleming. They each stated the year and make of a vehicle, as well as an amount payable, and this information corresponds exactly with the information on the three respective Travelers appraisal forms. Gov. Exs. 1-3, 5-7. The checks, moreover, are each dated within a week of their respective appraisal forms. Id. To the extent, therefore, the Government needed to prove a connection between Travelers and Constitution State Service Company, it has offered sufficient evidence for the jury

to infer such a connection.

5. Trial testimony is herein cited to the transcripts as filed with the Clerk. Thus, a citation to testimony includes both the date of the testimony and the docket entry number of the particular transcript containing the cited excerpt.

6. Many of the fraudulent claims submitted in the course of the Sun Oil scheme were inflated from the costs of repairs actually performed. In the case of defendant Ralph Fleming, the three fraudulent claims submitted were "inflated" from zero, in the sense that no repairs were ever performed. It would be absurd to suggest, however, that because the defendant's claims were completely fraudulent, rather than only partially false, the Government failed to prove that the costs represented on the appraisal forms for defendant Ralph Fleming's vehicles were inflated.

7. Defendant further claimed that by failing to object to the verdict slip, which recited the language from paragraph 12 of the indictment, the Government had chosen to proceed on the sole

theory that the only misrepresentation involved in the case was that the cars were damaged by the emissions from Sun Oil's Marcus Hook refinery. The defendant, however, has offered no support for the proposition that the verdict slip should override the full charge instructing the jury as to the misrepresentations that were alleged in the indictment, including both that emissions from Sun Oil's refinery damaged defendant's vehicles, and also that defendant's vehicles required repairs costing particular inflated amounts of money. See Trial Tr. of Jan. 14, 1993, Doc. No. 98, at 71 (jury charge).

8. Government Exhibits 1-3 are copies of the three appraisal forms submitted to Travelers for the claims for Ralph Fleming's vehicles, and Government Exhibits 5-7 are copies of the three checks issued to cover these claims. Exhibits 1-3 correspond to Counts 20-22 of the indictment, respectively, as do exhibits 5-7.

9. Defendant's reliance upon Federal Rule of Evidence 1002 is therefore misplaced. Rule 1002

requires an original writing to prove its contents, "except as otherwise provided in these rules." Fed. R. Evid. 1002. Because Rule 1003 provides for the admission of the duplicates at issue in this case, Rule 1002 by its own terms does not bar their admission.

10. On the contrary, an examination of the second pages of Government Exhibits 2 and 3, which were the appraisal forms for the second and third claims for Fleming's vehicles, suggests that the second page of the original of Exhibit 1 would not have contained any information materially qualifying the terms appearing on the first page. See Gov. Exs. 2-3.

11. Defendant's counsel requested that the Court instruct the jury based upon a Pattern Jury Instruction from the Federal Judicial Center. However, the official commentary included with the defendant's own submitted charge expresses reservation as to whether a "stand alone" charge is required. The attachment provided by defendant states:

Evidence of Defendant's Good Character

You have heard the testimony of _____, who said that the defendant, _____, (has a good reputation for [eg.: honesty] in the community where he lives and works)(in his opinion, is an [honest]person). Along with all the other evidence you have heard, you may take into consideration what you believe about the defendants [honesty) when you decide whether the government has proved, beyond a reasonable doubt, that the defendant committed the crime. Evidence of the defendant's [honesty] alone may create a reasonable doubt whether the government proved that the defendant committed the crime.

Commentary

It is not clear that the final sentence is legally required but the committee felt such a reference was appropriate. See Federal Judicial Center, Pattern Criminal Jury instructions par. 51 (1987).

12. In Youngblood the jury charge itself was not challenged. The trial court in Youngblood had, in fact, charged the jury with an adverse inference instruction. However, the

instruction charged was that if the jury found that the State had lost or destroyed evidence, they might draw an inference against the State. 488 U.S. at 54, 109 S. Ct. at p.35. Furthermore, the Supreme Court based its# decision in Youngblood on the good or bad faith of the government when loss or destruction of evidence is "attributable to the Government." 488 U.S. at 57, 109 S. Ct. at 337.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES CRIMINAL ACTION

v. NO. 92-608-6

RALPH FLEMING

ORDER

AND NOW, this 13th day of April, 1993, upon consideration of defendant Ralph Fleming's motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c) and his motion for a new trial pursuant to Federal Rule of Criminal Procedure 33, and after hearing oral argument on the motions, and for the reasons

stated in the accompanying Memorandum, it is hereby ORDERED that the motions are both DENIED.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1375

UNITED STATES OF AMERICA,

v.

RALPH FLEMING
Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania
D.C. Criminal No. 92-00608-06
(District Judge: Honorable Eduardo C. Robreno)

Submitted Under Third Circuit LAR 34.1(a) October 26, 1993

Before: BECKER, ROTH and LEWIS, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to-wit that:

1. the government failed to prove an element of the offense

charged, therefore, his conviction violates the Fifth Amendment's due process and grand jury clauses and must be reversed and judgment of acquittal entered;

2. the court committed error in sustaining a conviction based upon paragraph 13 of the indictment;

3. the district court erred in admitting into evidence copies of various documents introduced by the government;

4. the district court erred in denying defendant's request concerning evidence of his good character, and

5. the district court erred

in failing to charge the jury as requested by the defendant that it could draw an adverse inference against the government based on the destruction of relevant evidence by two of its witnesses.

IT IS ADJUDGED AND ORDERED that the judgment of the district court entered April 21, 1993, be and is hereby affirmed.

BY THE COURT.

Roth
Circuit Judge

Attest:
P. Douglas Sisk, Clerk

DATED: 10-28-1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1375

UNITED STATES OF AMERICA,

v.

RALPH FLEMING
Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge. BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, YGAARD, ALITO, ROTH and LEWIS, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: Dec 1, 1993